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No. 82-1682

In the Supreme Court of the United States

OCTOBER TERM, 1983

ABDEEN M. JABARA, PETITIONER

v.

WILLIAM H. WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

BARBARA L. HERWIG
R. JOHN SEIBERT
Attorneys

Department of Justice
Washington, D. C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Fourth Amendment requires a federal agency to secure a warrant before obtaining international electrical communications lawfully in the possession of another federal agency.

2. Whether Subsection (e)(7) of the Privacy Act, 5 U.S.C. 552a(e)(7), prohibits a federal agency from collecting and maintaining records reflecting the exercise of First Amendment rights when those records are pertinent to an authorized national security investigation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 90-103) is reported at 691 F.2d 272. The opinion of the district court on the motions for summary judgment (Pet. App. 1-83) is reported at 476 F. Supp. 561. Earlier opinions of the district court on issues relating to discovery are reported at 75 F.R.D. 475 and 62 F.R.D. 424.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1982, and a petition for rehearing was denied on December 17, 1982. The order denying the petition for rehearing was amended on December 22, 1982. On March 8, 1983, Justice O'Connor extended the time in which to file a petition for a writ of certiorari to April 16, 1983. The petition was filed on April 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Detroit lawyer active in pro-Arab causes. In 1967, the Federal Bureau of Investigation initiated a national security investigation of petitioner. In large measure, the FBI's investigative activities were a response to classified reports it received indicating that petitioner was a cadre member of Al Fatah, a Middle Eastern terrorist group.[1] As part of its investigation, the FBI asked the National Security Agency (NSA) for summaries of any international communications concerning petitioner that it had acquired. Pet. App. 90.[2]

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[1]These reports are discussed in various classified affidavits submitted to the district court, especially the In Camera Affidavit of Jack French paras. C and D (Aug. 27, 1979) (Class. App. 2-4) ("Class. App." refers to the Classified Appendix filed with the court of appeals). See also In Camera Affidavit of James Williamson para. 2(c)(iii) (Sept. 9, 1973) (Class. App. 2-4) and In Camera Affidavit of Robert Peterson para. (B) (Dec. 10, 1974) (Class. App. 13-18).

As the court of appeals explained (Pet. App. 94-96), material concerning petitioner's membership in Al Fatah was not disclosed to the district court before it rendered its decision because the government believed that the district court's decision to uphold the government's claim of state secrets privilege with respect to information concerning the National Security Agency's monitoring (see 75 F.R.D. at 492) had removed from the case any issues to which the sensitive material bearing on petitioner's membership in Al Fatah might be relevant. After the district court granted summary judgment in favor of petitioner on his Fourth Amendment claim, the government moved for reconsideration and offered, in camera, the affidavit relating to petitioner's membership in Al Fatah. The district court denied the motion for reconsideration. Pet. App. 83a-83b. The court of appeals expressly declined to rule on the correctness of the district court's denial of this motion. *Id.* at 95-96.

Petitioner was advised during proceedings in the court of appeals of the existence of information indicating that he was a member of Al Fatah. The specific nature of this information remains classified and has not been disclosed to petitioner.

[2]The NSA conducts electronic surveillance of international electrical communications—that is, communications having at least one terminus outside the United States. See Pet. App. 92-93.

The NSA furnished the FBI summaries of seven international telegrams, the contents of which were already in its possession when it undertook to respond to the FBI's request.[3] These telegrams were all sent or received by petitioner, and they were all sent to or from points outside the United States. See In Camera Affidavit of Secretary Harold Brown paras. 7-9 (Mar. 12, 1977) (Class. App. 78-81). They, like other international communications monitored by the NSA, were acquired by highly secret techniques. See Pet. App. 92-93.

2. Petitioner brought this action for damages and injunctive and declaratory relief against several current and former government officials. He claimed, among other things, that the FBI's investigation violated his rights under the Fourth Amendment and the Privacy Act of 1974, 5 U.S.C. 552a. In preliminary proceedings, the United States District Court for the Eastern District of Michigan ruled, with respect to the communications obtained from the NSA, that "the disclosure of the reports and summaries of [petitioner's] communications as well as their nature or mode and the means by which they were obtained would compromise a highly valuable source of foreign intelligence with serious adverse consequences to the capability of the President to conduct foreign affairs and to carry out his national defense responsibilities." 75 F.R.D. at 492. The court accordingly held that this information was subject to the military and state secrets privilege. *Ibid.*

Subsequently, the district court granted partial summary judgment in favor of petitioner, ruling that the FBI's acquisition of his communications from the NSA violated his rights under the Fourth Amendment (Pet. App. 63-71) and

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[3]The court of appeals incorrectly stated (Pet. App. 93) that six communications were involved.

that the government had maintained records that concerned petitioner's exercise of his First Amendment rights in violation of the Privacy Act of 1974 (*id.* at 71-80).[4] In connection with petitioner's Fourth Amendment claim, the court stated (*id.* at 59): "[W]hile it is not clear that [petitioner] was the target of the NSA interceptions, it is apparent that the FBI specifically requested summaries of [petitioner's] foreign communications." The court did not hold that the NSA's interception of petitioner's communications required a warrant. See *id.* at 64-65, 68-69. Instead, it ruled that even after a person's communications have been lawfully intercepted by the NSA, "the targeting [of those communications] * * * for summarization, transmission to, and subsequent examination by other agencies [such as the FBI] must be done pursuant to prior judicial authorization akin to a warrant." *Id.* at 69.[5]

Petitioner's Privacy Act claim was that the government had violated 5 U.S.C. 552a(e)(7), which provides that an agency maintaining a system of records shall:

> maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute * * * or unless pertinent to and within the scope of an authorized law enforcement activity.

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[4]The district court ordered injunctive relief. Pet. App. 86-87, 88-89. The court also dismissed several of petitioner's other claims and ordered that a trial be held on his claim that the investigation violated his First Amendment rights. Pet. App. 84-88. The district court had bifurcated the proceedings and accordingly did not address the damages claims against individual officials.

[5]The court acknowledged that a warrant is not required for foreign intelligence surveillance of an agent of a foreign power (Pet. App. 55-56, 66), but it declined to hold that petitioner was a foreign agent (*id.* at 70; see page 2 note 1, *supra*).

The district court found that the FBI had maintained records pertaining to petitioner's "expression of his political views in public and private speeches" (Pet. App. 75). The court then ruled that the maintenance of these records could not be justified under the "authorized law enforcement activity" exception because they "do not relate to [any] specific past, present or future criminal acts." *Id.* at 77.

3. The court of appeals vacated the judgment of the district court. It noted that petitioner "does not even contend * * * that the interception by the NSA violated his fourth amendment rights" (Pet. App. 93). The court accordingly assumed "that the NSA lawfully received and was in possession of the communications" (*id.* at 97). The court then rejected petitioner's contention that "his rights were violated when the NSA turned over the information, without a warrant, to the FBI" (*id.* at 93).

The court of appeals explained that the NSA's delivery of petitioner's communications to the FBI "was not a 'search' or 'seizure' within the meaning of the [Fourth A]mendment" (Pet. App. 97), for the following reasons (*id.* at 100-101):

> We do not believe that an expectation that information lawfully in the possession of a government agency will not be disseminated, without a warrant, to another government agency is an expectation that society is prepared to recognize as reasonable. * * * To hold otherwise would in many instances require, for fourth amendment purposes, a succession of warrants as information, lawfully acquired, is passed from one agency to another.

The court of appeals also vacated the district court's holding on the Privacy Act issue. It noted that both petitioner and respondents appeared to "agree * * * that the

district court's construction of the ['authorized law enforcement activity'] exemption in the statute, limiting it to investigation of past, present, or future criminal activity, is too narrow" (Pet. App. 103). The court of appeals noted that there was little difference between respondents' interpretation of the exemption—that it permits an "investigation with respect to the exercise of first amendment rights if such investigation is relevant to an authorized criminal investigation or to an authorized intelligence or administrative [investigation]" (*id.* at 102)—and petitioner's interpretation, that it permits such an investigation " 'if there is a direct nexus to an authorized criminal, civil or administrative law enforcement activity' " (*id.* at 103, quoting Pet. C.A. Br. 40). The court stated that "if there is any difference of substance between" these two interpretations, it believed respondents' to be more consistent with the legislative history (Pet. App. 103). The court then remanded to allow the district court to apply the correct standard. *Id.* at 103.[6]

ARGUMENT

1.a. The principal question presented by petitioner concerns whether the government should have obtained a warrant before examining his international electrical communications. In 1978—after this suit was brought, and after the FBI closed its investigation of petitioner (see Pet. App. 10)[7]—Congress specifically addressed this issue. The Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. (Supp. V) 1801-1811, establishes procedures for conducting electronic surveillance within the United States for foreign

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[6]The court of appeals expressly noted that the district court would be free, on remand, to take into account the materials relating to petitioner's acting as an agent for Al Fatah that it had previously refused to consider. Pet. App. 103; see page 2 note 1, *supra*.

[7]The district court held that the FBI's decision to end its investigation of petitioner did not render this case moot. Pet. App. 10-15.

intelligence purposes. The Act specifically requires a court order for "the acquisition * * * of the contents of any wire or radio communication" sent or received by a "United States person"[8] who is in this country "if the contents are acquired by intentionally targeting that United States person" (50 U.S.C. (Supp. V) 1801(f)(1)). The Act also requires a court order for the acquisition (within the United States) of any wire communication to or from any individual within the United States. 50 U.S.C. (Supp. V) 1801(f)(2).[9]

Today, therefore, if a government agency sought to obtain electrical communications sent to or from petitioner while he was in the United States, it would have to secure a court order.[10] The Fourth Amendment question presented by petitioner is therefore likely to have little if any practical significance beyond this case and does not merit this Court's review.

b. In addition, the court of appeals correctly disposed of petitioner's claim on this point.[11] As that court repeatedly

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[8]The term "United States person" includes citizens, aliens lawfully admitted for permanent residence, and certain associations. See 50 U.S.C. (Supp V) 1802(a).

[9]In certian limited circumstances not relevant here, such communications may be acquired on the basis of an Attorney General order. See 50 U.S.C. (Supp. V) 1802(a).

[10]Electronic surveillance of persons outside the United States is now governed by Exec. Order No. 12333, 3 C.F.R. 200, which provides that the use of any technique against a United States citizen abroad that would require a warrant if undertaken for law enforcement purposes cannot be undertaken except with the approval of the Attorney General upon a determination "in each case that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power." Exec. Order No. 12333, Part 2.5, 3 C.F.R. 212.

[11]Petitioner suggests (*e.g.*, Pet. 7) that the FBI's investigation of him was prompted by hostility to his political views. If this were true, it might state a violation not of the Fourth Amendment but of petitioner's First Amendment rights. The district court did not grant summary

noted (Pet. App. 93, 96-97, 100), petitioner conceded below that the NSA's interception and acquisition of his communications were lawful. Despite his somewhat extreme rhetoric, petitioner does not repudiate that concession in this Court. See, *e.g.*, Pet. 16-17.

Accordingly, as the court of appeals correctly noted, the only issue is whether a warrant was required before petitioner's communications could be transferred from one federal agency, which lawfully possessed them, to another. It is entirely clear that no warrant is required in such circumstances. See *United States* v. *Calandra*, 414 U.S. 338, 354 (1974); *United States* v. *Miller*, 425 U.S. 435, 443 (1976); cf. *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 5-6 & n.5. Once a government agency lawfully has possession of information about a person, that person has no reasonable expectation that the agency will not reveal the information to others within the government who are carrying out their official responsibilities. Information is transferred from one agency to another on innumerable occasions (see 18 U.S.C. 2517(1)), and it has never been suggested that the Fourth Amendment requires a warrant before each such transfer. Indeed, petitioner cites no case in which a warrant was required for the intra-governmental transfer of information.

At some points, petitioner appears to assume that the NSA automatically records all electronic communications and retains them in a form inaccessible to humans; petitioner then argues that a "search" of his communications within the meaning of the Fourth Amendment occurred not when they were acquired but only when his particular communications were retrieved from the mass of raw data and reduced to an understandable form at the FBI's

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judgment on the First Amendment claim in petitioner's complaint, however, and that claim is still pending in the district court. See Pet. App. 48.

request. See Pet. 16-17, 27-33.[12] The premise of this argument, however, is that the NSA's warrantless activity—the constitutionality of which petitioner does not challenge—consisted of no more than the indiscriminate collection of all communications. See, *e.g.*, Pet. 29. This premise is not supported by the record. As we noted (page 3, *supra*), the district judge sustained a claim of military and state secrets privilege with respect to information concerning the means by which petitioner's communications were acquired.

If, for example, communications were acquired, not on an indiscriminate basis, but by highly selective monitoring—such as monitoring designed to acquire, so far as possible, only the communications of a particular foreign intelligence target—any "search" within the meaning of the Fourth Amendment might well occur at the time of the monitoring, not at some subsequent point when analysts sifted the acquired communications for useful data. But the extent to which the NSA's monitoring discriminates among communications is highly secret. Moreover, even if petitioner had not conceded the lawfulness of the NSA's monitoring, the privileged nature of information concerning the NSA's activities would make it impossible to assess the reasonableness of its monitoring.

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[12]Even if this argument were correct, it would not follow that the Fourth Amendment required a warrant. As noted above, the government had reason to believe that petitioner was an agent of a foreign power, and the courts of appeals have consistently held that a warrant is not required for electronic surveillance of the communications of foreign agents as part of a foreign intelligence investigation. See *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 913-916 (4th Cir. 1980), cert. denied, 454 U.S. 1144 (1982); *United States* v. *Buck*, 548 F.2d 871, 875 (9th Cir. 1977); *United States* v. *Butenko*, 494 F.2d 593, 605-606 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); *United States* v. *Brown*, 484 F.2d 418, 426 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974). Compare *Chagnon* v. *Bell*, 642 F.2d 1248, 1259 (D.C. Cir.), cert. denied, 453 U.S. 911 (1981), with *Zweibon* v. *Mitchell*, 516 F.2d 594, 651 (D.C. Cir. 1975) (en banc) (plurality opinion) (dictum), cert. denied, 425 U.S. 944 (1976).

Similarly, petitioner acknowledges that if his "messages had been intelligible when monitored, the constitutional injury would * * * have occurred fully at that point" (Pet. 33 n.40; emphasis omitted) and the subsequent transfer to the FBI would not require a warrant. But there is no basis in the record for concluding that petitioner's messages were not reduced to intelligible form when they were acquired or at some point thereafter, independently of the FBI's request. Because petitioner's claim depends, in these ways, upon his speculative assertions about privileged matters, the court of appeals properly ordered that it be dismissed. See *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139, 146-147 (1981), quoting *Totten* v. *United States*, 92 U.S. 105, 107 (1876) (" '[P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.' ").[13]

2. The district court held that the "authorized law enforcement activity" exception to Subsection (e)(7) of the Privacy Act covers only law enforcement activity "relate[d] to * * * specific past, present or future criminal acts." Pet. App. 77. Petitioner has not defended this interpretation of the statute in either the court of appeals (see *id.* at 102-103) or this Court. See Pet. 37-38 n.42 ("Petitioner does not contend that the 'law enforcement activity' exemption

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[13]Petitioner is plainly wrong in his repeated assertions (*e.g.*, Pet. 22-23, 34-35) that the court of appeals' approach permits the government to examine all communications to which it can gain electronic access. As we noted, the court of appeals repeatedly made clear its reliance on petitioner's concession that the initial acquisition of the communications by the NSA did not require a warrant. See Pet. App. 93, 96-97, 100. The court's holding is therefore relevant only when information is initially lawfully acquired.

necessarily requires an investigative focus on specific *criminal* activity"). The court of appeals was, therefore, plainly correct in vacating the district court's judgment on this issue and remanding, and while petitioner objects to the standard the court of appeals ordered the district court to apply on remand, he has been unable to specify with any precision the alternative standard he endorses. Indeed, the court of appeals was uncertain whether petitioner's interpretation of Subsection (e)(7) differed from respondents' at all. In view of the poorly focused and highly abstract nature of the issue at this point, and the interlocutory posture of this aspect of the case, further review at this time is inappropriate.

In any event, the legislative history of the "authorized law enforcement activity" exception to Subsection (e)(7) demonstrates that it embraces an authorized national security investigation. The phrase "authorized law enforcement activity" was added as a floor amendment to the provision that became Subsection (e)(7). Rep. Ichord, the sponsor of this amendment, explained that without it the prohibition against the collection of information reflecting the exercise of First Amendment rights "can be construed to cover activities which are properly within the scope of legitimate law enforcement. * * * The terms of the broad prohibitions * * * would, for example, embrace the activities of the Communist Party and similar groups * * * [or] certain sects within the Black Muslim movement, which have been described by the Director of the FBI as endangering the internal security" (120 Cong. Rec. 36650 (1974)). He then further elaborated (120 Cong. Rec. 36651 (1974) (emphasis added)):

> **In referring to a "law enforcement activity" * * * I am, of course, using the expression "law enforcement" in its general meaning and in the broadest reach of the term. I include within that term those purposes and activities**

> which are authorized by the Constitution, or by statute, or by the rules and regulations and the executive orders issued pursuant thereto. Thus, the investigatory material maintained shall include, but not be limited to, that which is compiled or acquired by any federal agency in connection with and for the purpose of determining initial or continuing eligibility or qualification for Federal employment, military service, Federal contracts, or access to classified information.
>
> I want to emphasize—so that there is no misunderstanding—*these changes are designed to protect only legitimate national or internal security intelligence and investigations*, and no records or files shall be kept on persons which are not within constitutional limitations. Let the legislative history be explicit. None of these changes are intended to abridge the exercise of first amendment rights. The rights of Americans to dissent in a lawful manner and for lawful purposes must be preserved.

Rep. Moorhead, the floor manager of the bill that became the Privacy Act (see 120 Cong. Rec. 36643) (1974)), accepted the amendment and stated that it was to be interpreted in light of Rep. Ichord's remarks. 120 Cong. Rec. 36651, 36957 (1974). Thus, as petitioner appears to acknowledge (Pet. 38-39), Rep. Ichord's remarks are authoritative, and these remarks could hardly be more explicit: national security intelligence investigations (like background investigations of prospective federal employees[14]) are "authorized law enforcement activity" within the meaning of Subsection (e)(7). The court of appeals was, therefore, clearly

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[14]Petitioner makes no effort to explain how Rep. Ichord's reference to background investigations can be reconciled with petitioner's vague proposal for a " 'violation-oriented' construction of subsection (e)(7)" (Pet. 44).

correct in holding that information concerning First Amendment rights could be maintained in a system of records if it was relevant to "an authorized intelligence or administrative [investigation]" (Pet. App. 102).

Petitioner asserts that the court of appeals' decision conflicts with *Clarkson* v. *IRS*, 678 F.2d 1368 (11th Cir. 1982). But *Clarkson* did not involve a national security investigation; the *Clarkson* court, therefore, simply did not confront the issue presented by this case. Indeed, the court noted in *Clarkson* that "the record in this case does not reveal * * * the purpose of the surveillance activities" (678 F.2d at 1375). The *Clarkson* court accordingly intimated that the government may have been collecting information about the exercise of First Amendment rights in the hope that that information might in some undetermined way prove useful in connection with law enforcement activities (678 F.2d at 1375). By contrast, the FBI investigated petitioner for national security reasons, and its acquisition of information about petitioner's exercise of his First Amendment rights was undertaken in the course of, and incident to, that legitimate investigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

BARBARA L. HERWIG
R. JOHN SEIBERT
Attorneys

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